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NO. 82-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WARD W. MILLER, Trustee in Bankruptcy,

Petitioner,

-vs-

JAMES STEWART LEGARE HAYNES, SR.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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I. QUESTION PRESENTED

Does Navy retainer pay and retired pay earned after a sailor has filed for relief under Chapter 7 of the United States Bankruptcy Code constitute property of a bankruptcy estate?

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IV. STATUTES INVOLVED

Chapter 39 of the General Military Law,

10 U.S.C. § 688, provides, inter alia:

> (a) Under regulations prescribed by the Secretary of Defense, a retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps may be ordered to active duty by the Secretary of the military department concerned at any time.

Article 2 of the Code of Military Justice,

10 U.S.C. § 802 provides, inter alia:

> The following persons are subject to this chapter:
> (4) Retired members of a regular component of the armed forces who are entitled to pay
> (6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

Subtitle C, entitled "Navy and Marine

Corps" of Title 10 of the United States

Code provides,

10 U.S.C. 6330, inter alia:

> (b) An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve . . .

(c)(1) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled when not on active duty, to retainer pay -

10 U.S.C. § 6331, inter alia:

(a) When he has completed 30 years of service or when he isfound not physically qualified in an examination under section 6485 of this title, a member of the Fleet Reserve or the Fleet Marine Corps Reserve shall be transferred -

(1) To the retired list of the Regular Navy . .

10 U.S.C. § 6485, inter alia:

(a) A member of the Fleet Reserve or the Fleet Marine Corps Reserve may be ordered by competent authority to active duty without his consent -

(1) in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter;

(2) in time of national emergency declared by the President or

(3) when otherwise authorized by law.

(b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period [and shall be physically examined at least once during each four-year period. If any member fails to report for the physical examination, the Secretary may order any pay due that member forfeited.]

(b) In time of peace any member of the Fleet Reserve or the Fleet Marine Corps Reserve may be required to perform not more than two months' active duty for training in each four-year period. (Bracketed provision was deleted by amendment of July 30, 1977, Pub. L. 95-79, Title VIII, § 805, 91 Stat. 333.)

Chapter 5 of the United States Bankruptcy Code Provides, 11 U.S.C. § 541 inter alia:

(a) The commencement of a case under section 301, 302 or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(6) Proceeds, product, offspring, rents and profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

V. STATEMENT OF THE CASE

This case began when the Respondent-debtor, James S. L. Haynes, Sr. and his wife, Joanne G. Haynes, filed a joint voluntary petition for bankruptcy on July 11, 1980. They filed for relief under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C.A. § 701 et. seq. The debtors listed in their petition some $35,390.53 in debts. Of this amount, $3,000 was owed to a secured creditor and was apparently satisfied by the return of the collateral, and $26,600.22 was owed to another secured creditor, North American Van Lines. This debt to North American was subsequently readjusted to $35,180.31

and reaffirmed by the debtors. The remaining amount, $10,978.81, was owed to unsecured creditors.

The debtors listed exempt assets of $5,135.00 and assets subject to distribution of $3,643.09. There is no record of whether any of these non-exempt assets were secured by the trustee and distributed.

In the petition, the debtors listed their income from Mr. Haynes' employment as a contract truck driver for North American Van Lines and from his service in the Fleet Reserve of the United States Navy. According to the testimony of Mr. Haynes at the meeting of the creditors he retired in 1971 from active duty in the Navy. Under the terms of 10 U.S.C.A. § 6330, Mr. Haynes was transferred to the Fleet Reserve and was entitled to receive retainer pay for the next ten (10) years.

After the meeting of creditors, the Petitioner-Truetee applied for an order to compell the Respondent to turn over his future monthly pay checks from the Navy until all of the debts were paid. If such an order had been issued, the case would have been held open for approximately one and a half-years.

However, on October 31, 1980, the Bankruptcy Court granted a discharge to the debtors. Without any further evidentiary hearings, on March 6, 1981 the Bankruptcy Court ruled on the trustee's turn-over application and held that Mr. Haynes' retirement pay was in the nature of future wages and not property of the estate. Therefore the Bankruptcy Court denied the relief sought by the Trustee.

By consent obtained from the debtors' former attorneys, the trustee appea'ed the Order of the Bankruptcy

Court directly to the Seventh Circuit Court of Appeals under the terms of 28 U.S.C.A. § 1293(b). Subsequently, the Court of Appeals affirmed the decision of the Bankruptcy Court.

VI. ARGUMENT SUMMARY

The commencement of a Chapter 7 bankruptcy effects a date of cleavage. All legal or equitable property interests that the debtor owned as of the commencement of the case become property of the estate. 11 U.S.C.A. § 541(a)(1). Unless the debtor can exempt these property interests from the estate under 11 U.S.C.A. § 522(b), the trustee liquidates these property interests for distribution to creditors holding allowed unsecured claims. See 11 U.S.C. §§ 704(a)(1) and 726. In contrast, the debtor is entitled to retain free from the claim of the trustee most property interests that the debtor

acquires after the commencement of the case.[1]

Significantly, 11 U.S.C.A. § 541(a)(6) expressly excludes from the property of the estate "earnings from services performed by an individual debtor after the commencement of the case." Respondent-Debtor Haynes asserts that the retainer pay and retired pay here in issue are earnings excluded from the property of

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1. 11 U.S.C.A. § 541(a)(5) provides that if the debtor acquires property interests by specified types of transfers within 180 days after the commencement of the case, the property interests constitute property of the estate. The provision applies only to acquisitions of property interests.

"(A) by bequest, devise, or inheritance

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce debree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan."

the estate by 11 U.S.C.A. § 541(a)(6). Therefore, the questions of whether retainer pay and retired pay are exempt under 11 U.S.C.A. § 522(b) or whether retainer pay and retired pay constitute "property" within the meaning of 11 U.S.C.A. § 541(a) are not before this Court. The retainer pay and retired pay in issue constitute earnings for services Mr. Haynes performed after the commencement of the case rather than deferred compensation for services performed prior to the commencement of the case. In United States v. Tyler, infra, this Court held that military retirement pay constituted reduced compensation for reduced services. And the decision of the Seventh Circuit in this case is consistent with Tyler and does not conflict with any decisions of this Court, any other Circuit Courts of Appeals or any of the highest courts of the states.

VII. ARGUMENT

In United States v. Tyler, 105 U.S. 244 (1881) this Court held that military retirement pay is reduced compensation for reduced current services. Under the Bankruptcy Code, "earnings from services performed by an individual debtor after commencement of . . ." a bankruptcy are specifically excluded from seizure by the trustee. See 11 U.S.C.A. § 541(a)(6). In this case the property sought by the trustee is compensation earned for served performed by Mr. Haynes after he filed his bankruptcy petition.

The trustee cannot succeed in this case unless this Court is prepared to overrule its decision in United States v. Tyler, supra. In Tyler, an Army Captain who had been retired due to wounds received in battle brought suit seeking an increase in his pay as provided by a statute which had increased the pay of Army officers.

The Captain had been denied the increase because he was retired; however, this Court held that a retired Army officer is still in the military service of this country and entitled to the pay increases provided by Congress. This Court's reasoning was summarized as follows:

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service. (Emphasis in opinion.)

Supra at 246.

The status of retired military officers and enlisted personnel has changed little since the Tyler decision.

Retired officers and retired enlisted men who served in a war are entitled to wear their uniforms. See 10 U.S.C. § 772. Retirees remain members of the armed services. See 10 U.S.C. § 5001. Retirees may be recalled to active duty at any time. See 10 U.S.C. § 688. Retirees are subject to the Uniform Code of Military Justice and may be tried by courts martial. See 10 U.S.C. § 802 and O'Callahan v. Parker, 395 U.S. 258 (1968). And retirees may be dismissed from the military service. See Hooper v. United States 326 F.2d 982 (Ct.Cl. 1964) cert. den. 377 U.S. 977 (1964) and Hooper v. Laird, 482 F.2d 784 (D.C. Cir. 1973). Therefore, the Respondent Haynes remains under the same obligations as Captain Tyler.

In fact, when Mr. Haynes filed his bankruptcy petition he was not classified as a retiree. Upon completion of

twenty years active service, Mr. Haynes was transferred to the Fleet Reserve under 10 U.S.C.A. § 6330(b) and received retainer pay (as opposed to retired pay) for service as a Fleet Reservist. See 10 U.S.C.A. § 6331(c). As a Fleet Reservist, Mr. Haynes remained a member of the Naval Service of the United States. See 10 U.S.C.A. 5001(1) and (3). As a Fleet Reservist, Mr. Haynes was subject to perform up to two months of active duty training for every four years in the Fleet Reserve, and prior to 1977 Mr. Haynes was subject to report for physical examinations. See 10 U.S.C.A. § 6485 (amendment of July 30, 1977 by Pub.L. 95-79 deleted the requirement of physical examinations.) In 1980 Congress enacted 10 U.S.C.A. § 688 which provides that " . . . a retired member of the Regular Navy . . . may be ordered to active duty by the Secretary [of the Navy] at

any time." The reality is that Mr. Haynes can be ordered to active duty today.

Despite the assertions of the Trustee, all other Americans cannot be ordered to active duty. The Selective Service Act does not establish that every civilian citizen not exempted is subject to conscription. (See pp. 18-19 of the Trustee's Petition.) The Selective Service Act provides that males between eighteen (18) and twenty-six (26) years of age may be required to register with the Selective Service and 50 App. U.S.C. § 456 (cited by the Trustee) established exemptions in case of a mobilization. Even those subject to registration are not subject to conscription at present. Mr. Haynes can be re-called at any time.

There is no question that Mr. Haynes' does not have to report to work everyday, but his potential duties and obligations are substantial. As a Fleet

Reservist, his pay from the Navy was denominated "retainer pay." This nomenclature is particularly appropriate in light of Mr. Haynes potential obligations and is one very common to the legal profession. To earn a retainer, one is expected to render service when requested but none which is not requested. See Rhode Island Exch. Bank v. Hawkins, 6. R.I. 198 (1859). Just as with legal retainers, Mr. Haynes pay is earned by his availability.

Congress' designation of Mr. Haynes' compensation as "pay" demonstrates the intent to distinquish such compensation from pensions or welfare benefits. And like active duty pay, Mr. Haynes' pay is subject to income taxation, see generally 26 U.S.C. §§ 61 and 122, and ceases upon his death. Finally, such pay is subject to termination or reduction by Congress and therefore Mr. Haynes has no vested interest or right in his retirement pay.

See Bell v. United States 366. U.S. 393 (1961).

In 1981, this Court recognized that Congress may have intended military retired pay to be current compensation for current services and advised caution to prevent disruption of our nation's scheme for military prepardness. See McCarty v. McCarty 453 U.S. 210, at 223, fn. 16. (1981). The petitioner presents no compelling circumstances that would require an overruling of United States v. Tyler, supra. Nor do the facts of this case justify a disruption of the present scheme of Congress for insuring the availability of well-trained and experienced veterans.

VIII. CONCLUSION

As the decision below does not conflict with any decisions of the other Circuit Courts or the highest courts of any states and the decision is in accord

with the prior decisions of this Court, the Trustee's petition should be denied.

Respectfully Submitted,

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